

No. 15673

United States Court of Appeals
FOR THE NINTH CIRCUIT

ROBERT LEE KORTE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

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**Appeal from the United States District Court for the
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JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Northern District of California, Southern Division. [R. 6-8]¹ The District Court had jurisdiction under Title 18, § 3231, U. S. C. A. The indictment charged an offense against the Universal Military Training and Service Act

¹ Numbers appearing herein within brackets preceded by "R." refer to pages of the printed transcript of record filed herein.

(50 U. S. C. A. App. § 462). [R. 3-4] This Court has jurisdiction of this appeal under Rule 37 (a) (1) and (3) of the Federal Rules of Criminal Procedure because the notice of appeal was filed in the time and manner required by law. [R. 7-8]

STATUTES INVOLVED

Section 6(m) of the Act (50 U. S. C. A. App. § 456(m)) provides as follows:

“No person shall be relieved from training and service under this title [sections 461-454 and 455-471 of this Appendix] by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year.”

Section 12(a) of the Act (50 U. S. C. A. App. § 462(a)) provides:

“... Any ... person ... who ... refuses ... service in the armed forces ... or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title ... shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment ...”

REGULATIONS INVOLVED

Section 1622.44 of the Selective Service Regulations (32 C. F. R. § 1622.44; E. O. 10292, 16 F. R. 9862, Sept. 28, 1951) reads as follows:

“*Class IV-F: Physically, mentally, or morally unfit.* In Class IV-F shall be placed any registrant (a) who is found

to be physically or mentally unfit for any service in the armed forces; (b) who, under the procedures and standards prescribed by the Secretary of Defense, is found to be morally unacceptable for any service in the armed forces; (c) who has been convicted of a criminal offense which may be punished by death or by imprisonment for a term exceeding one year and who is not eligible for classification into a class available for service; or (d) who has been separated from the armed forces by discharge other than an honorable discharge or a discharge under honorable conditions, or an equivalent type of release from service, and for whom the local board has not received a statement from the armed forces that the registrant is morally acceptable notwithstanding such discharge or separation.”

Section 1623.2 of the Selective Service Regulations (32 C. F. R. § 1623.2; E. O. 10292, 16 F. R. 9862, Sept. 28, 1951) reads as follows:

“Consideration of classes. Every registrant shall be placed in Class I-A under the provisions of § 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I-A-O considered the highest class and Class I-C considered the lowest class according to the following table:

Class :

I-A-O	IV-A
I-O	IV-B
I-S	IV-C
II-A	IV-D
II-C	IV-F
II-S	V-A
I-D	I-W
III-A	I-C”

Section 1626.26 (a) of the Selective Service Regulations (32 C. F. R. § 1626.26 (a) ; E. O. 9988, 13 F. R. 4874, Aug. 21, 1948, redesignated at 14 F. R. 5021, Aug. 13, 1949) reads as follows :

“The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.”

STATEMENT OF THE CASE

Appellant was charged by indictment, which alleged he did “on or about the 26th day of November, 1956, in the City and County of San Francisco, State and Northern District of California, knowingly fail to perform such duty, in that he, the said defendant, having theretofore been duly classified in Class I-O, did then and there knowingly refuse and fail to comply with the order of his said Local Board No. 40, to report to his said Local Board No. 40 to be given instructions to proceed to a place of employment designated by said Local Board No. 40 for the purpose of doing civilian work contributing to the maintenance of the national health, safety and interest as provided in the said Act and the rules and regulations made pursuant thereto.” [R. 4] Appellant pleaded not guilty and waived the right of trial by jury. [R. 5]

The case proceeded to trial on June 3, 1957. [R. 9] The entire draft board file was received into evidence as Government's Exhibit No. 1. [R. 9] It was stipulated that the appellant failed to report to his local board, as ordered on November 26, 1956. [R. 10] Pertinent parts of the draft board file were read into the evidence. [R. 11-34] Appellant testified in his own behalf. [R. 40-55]

Appellant registered with his local board on March 28, 1951, and on December 22, 1951, filed his classification questionnaire. (F. 6)² He showed that he was a student at the University of California. (F. 11) He certified that he was a conscientious objector. He filed a conscientious objector form on April 21, 1952. (F. 12, 252-254) He was classified I-A by his local board and appealed to the appeal board. (F. 13) His case was referred to the Department of Justice for investigation. (F. 228) Following a hearing in the Department of Justice a recommendation was made to the appeal board resulting in a I-A classification. (F. 5, 228-230, 239)

When ordered to report for induction he refused to submit to induction on April 28, 1953. (F. 217-224, 239) He was indicted on May 13, 1953. (F. 212) He pleaded not guilty on June 17, 1953. (F. 211) On July 3, 1953, he was convicted of a felony and sentenced to the custody of the Attorney General for a period of 18 months. (F. 208-209) [R. 9-10, 14-15, 23, 40-41, 46, 49] On August 3, 1953, the appellant commenced serving his time in the custody of the Attorney General pursuant to the judgment of conviction. (F. 206-207) [R. 46]

Appellant was released from the custody of the Attorney General on March 24, 1954, and stayed on parole until February 2, 1955. [R. 46] During this period of time he was classified IV-F on September 11, 1953. [R. 13, 15] (F. 200)

Two days after the date of expiration of appellant's parole the local board on February 4, 1955, classified him I-A. (F. 13) [R. 15-16] On February 11, 1955, a special form for conscientious objector (Form No. 150) was mailed to the appellant, requiring him to give additional information. (F. 14, 189) The appellant filled out the conscientious objector form and showed the same information as before except he added that he had been arrested, convicted and sent to

² Numbers preceded by "F." appearing in *parentheses* herein refer to the pages of the draft board file (Government's Exhibit 1). Such page numbers, written in longhand, appear at the top of each page of the file.

the federal prison because of his stand as one of Jehovah's Witnesses against military service. (F. 186, 191-194) He filed additional information showing his ministerial activity and corroborating his claim for classification as a minister of religion. (F. 154-185) He filed a special claim for classification as a minister. (F. 143-153) This was accompanied by statements corroborating his ministerial activity. (F. 137-142) He also filed information answering a special questionnaire about his religious affiliation and activity. (F. 125-135)

The local board on April 1, 1955, classified him I-A. (F. 114) Appellant appealed to the appeal board. (F. 14, 124) His case was referred to the Department of Justice. The investigation by the FBI and the recommendation of the Department of Justice showed the appellant's sincerity as a conscientious objector, as well as his having been convicted of a felony and serving 18 months in prison. (F. 56-80, 112-121) [R. 23, 25-26]

While the appellant's case was pending before the appeal board he was on August 30, 1955, ordered to take a physical examination on September 9, 1955. (F. 99) He took the physical examination and was found acceptable, and in addition the armed forces examiner stamped upon the order an army waiver of the appellant's prior conviction for a felony. (F. 83-96) On December 20, 1955, the appellant was notified of his physical acceptability for military service. (F. 14) [R. 21] The Department of Justice on September 29, 1956, recommended to the appeal board that the appellant be classified as a conscientious objector. (F. 56-80) The appeal board on July 20, 1956, classified the appellant I-O. (F. 4)

The appellant refused to designate a type of civilian work that he wanted to do as a conscientious objector pursuant to the request of the local board. (F. 43-44) The local board then offered appellant three types of civilian work to choose from but he refused to do this. (F. 38-40) The appellant was requested to appear before the local board for a

special hearing with a representative of the state headquarters in an effort to reach an agreement as to the type of work he would be willing to accept as a conscientious objector. (F. 14, 28, 31) The appellant stated his reasons for refusal to do civilian work. (F. 26-27) The Director of Selective Service approved the issuance of an order commanding the appellant to do civilian work. (F. 24) The local board ordered the appellant to report to Los Angeles County Department of Charities to do civilian work on November 28, 1956. (F. 14, 20) The appellant failed to report to the local board. (F. 14, 20)[R. 10]

QUESTIONS PRESENTED AND HOW RAISED

I.

Whether the appeal board denied the IV-F classification without basis in fact contrary to Section 1622.44 of the Selective Service Regulations, resulting in the I-O classification being arbitrary, capricious and contrary to law and making the final order to do civilian work void.

This question was raised in the motion for judgment of acquittal. [R. 35, 56]

II.

Whether the appeal board arbitrarily and capriciously failed to follow the classification procedure commanded by Section 1623.2 by failing to come up from the bottom of the list of classifications from I-C up to IV-F but went down the list of classifications from I-A-O to I-O and ignored the IV-F classification, making the final order to do civilian work void.

This question was raised by the motion for judgment of acquittal. [R. 36-37, 56-57]

SPECIFICATION OF ERROR

The district court erred in failing to grant the motion for judgment of acquittal duly made at the close of the government's case and renewed at the close of all of the evidence. [R. 36-39, 56-60] The court denied the motion. [R. 39, 60-61] Grounds in the motion are made the basis of the statement of points to be raised on appeal. [R. 76-77]

ARGUMENT

ONE

The appeal board denied the IV-F classification without basis in fact contrary to Section 1622.44 of the Selective Service Regulations, resulting in the I-O classification being arbitrary, capricious and contrary to law and making the final order to do civilian work void.

Section 6 (m) of the Act (50 U. S. C. A. App. § 456 (m)) in the proviso clause thereof relieves from "training and service" any person who has been convicted of a felony. The undisputed evidence in this case shows that the appellant was previously convicted of a felony in the United States District Court for the Northern District of California, Southern Division, on July 3, 1953, and sentenced to serve a term of 18 months in the custody of the Attorney General on July 14, 1953. (F. 209)[R. 14-16, 23, 46]

The armed forces waiver of the moral disqualification because of conviction appearing in the draft board file and dated September 9, 1955 (F. 83-96) was not basis in fact for the I-O classification of July 20, 1956, by the appeal board. (F. 4) Section 1622.44 (b) of the Regulations (32 C. F. R. § 1622.44 (b)) deals with persons who are found to be "morally unacceptable for any service in the armed forces" by the Secretary of Defense. Subdivision (b) of Section 1622.44 of the Regulation (32 C. F. R. § 1622.44) does not deal with convictions of felonies but relates only to morals and other

felony convictions. Subdivision (c) of the Regulation deals with persons who are convicted of felonies. However, it goes on to add that the person must also not be “eligible for classification into a class available for service.” This particular addition to the language appearing in the Act (50 U. S. C. A. App. § 456 (m)) is ambiguous. If the Regulation be construed that a person who has been convicted of a felony to be eligible to the IV-F classification must also be otherwise not eligible for classification for service, then it is in conflict with the statute and of no force and effect and it cannot be used as a basis for a denial of the IV-F classification.

The armed forces waiver prescribed by subdivision (b) is not equivalent to a denial of the rights prescribed by the Act (50 U. S. C. A. App. § 456 (m)) to a IV-F classification since the statute disqualifies a person who has been convicted of a felony. If it be contended that the armed forces waiver of disqualification constitutes a waiver of conviction then the appellant takes the position that such waiver, subsection (b) of the Regulation and the regulations of the armed forces prescribed by the Secretary of Defense to that effect are void because they are in conflict with *Sterrett v. United States*, 216 F. 2d 659 (9th Cir. 1954).

A reasonable interpretation to be made of the Regulation (32 C. F. R. § 1622.44 (b)) prescribing the power of the Secretary of Defense to accept persons otherwise morally unfit is that subdivision (b) of the Regulation does not relate to persons convicted of felonies. It is confined to persons otherwise not morally acceptable to the armed forces.

In the event that the Regulation is construed otherwise so as to authorize the Secretary of Defense to find persons convicted of felonies morally acceptable and thus make such acceptance basis in fact for the denial of the IV-F classification, then appellant takes the position that the Regulation is in conflict with the Act (50 U. S. C. A. App. § 456 (m)) or ultra vires, thus making the classification based upon such action arbitrary and capricious and con-

stituting no basis in fact for the denial of the IV-F classification.

In the event that it is argued that subdivision (c) of the Regulation (32 C. F. R. § 1622.44 (c)) prescribing the disqualification of a person convicted of a felony by making it contingent upon such person's being otherwise ineligible for service, then such construction makes the Regulation *ultra vires*. It constitutes, therefore, an illegal amendment by the Regulation (32 C. F. R. § 1622.44) of an Act of Congress (50 U. S. C. A. App. § 456 (m)) in violation of the law.—*Sterrett v. United States*, 216 F. 2d 659 (9th Cir. 1954).

A more reasonable interpretation of such ambiguous regulation is that a person who has been convicted of a felony is not eligible for classification for service. This reasonable interpretation of that subdivision of the Regulation in order to avoid bringing the Regulation in conflict with the statute and being void must be accepted by the Court. Where a regulation can be given a reasonable interpretation so as to avoid a declaration of its invalidity it should be thus interpreted.

This interpretation commanded by the law to avoid a declaration of invalidity means that the word "who" following the word "and" and preceding the words "is not eligible" appearing in subdivision (c) of Section 1622.44 of the Regulation is mere surplussage. In the event that the Court does not accept this interpretation but construes the Regulation so as to authorize a holding that there was basis in fact for the denial of the IV-F classification then the appellant says that such Regulation is void because it is in conflict with the Act (50 U. S. C. A. App. § 456 (m)) disqualifying from service all persons who have been convicted of a felony.—*Sterrett v. United States*, 216 F. 2d 659 (9th Cir. 1954).

It may be argued by the Government that the contention hereinabove made, that subdivision (b) of Section 1622.44 does not extend to convictions of felonies, and that subdivision (c) of Section 1622.44 is ambiguous, was not ex-

pressly raised in the court below and therefore cannot be here considered. It is submitted that the appellant's contention in the trial court that there was no basis in fact for the denial of the IV-F classification and that the appeal board was arbitrary, capricious and contrary to law, is adequate to support the contentions above made.

In the event, however, that the Court does not so agree it is submitted that the induction order of the local board was not proved by the Government to be "a valid induction order as a basis for appellant's conviction," as stated by this Court in *Franks v. United States*, 216 F. 2d 266, at page 270 (1954). As there stated, "the conviction notwithstanding this disregard of the Regulations constitutes a plain error within the meaning of Rule 52(b) of the Rules of Criminal Procedure, 18 U.S.C.A." (216 F. 2d at page 270) It is submitted that the error of the court below in failing to hold that the draft board order was void because the classification was contrary to law so seriously affects the substantial rights of the appellant that the judgment must be reversed.

It may also be argued by the Government that because the appellant did not file a formal claim for the IV-F classification or an appeal statement claiming the IV-F classification but, on the contrary, at all times insisted that he should be classified as a minister constitutes a waiver of his right to challenge the appeal board classification for a failure to give him the IV-F classification. In the event such argument is advanced it will be contrary to the holding of this Court in *Cox v. Wedemeyer*, 192 F. 2d 920 (9th Cir. 1951). In that case this Court, *inter alia*, said: "We think that the meaning of these regulations was that the board of appeal was required to classify the registrant de novo on the basis of his whole Selective Service Record." See also *Franks v. United States*, 216 F. 2d 266 at pages 269-270 (9th Cir. 1954); *Pine v. United States*, 212 F. 2d 93 at page 98 (4th Cir. 1954); *United States v. Pitt*, 144 F. 2d 169, 172 (3rd Cir. 1944).

Section 1626.26 (a) of the Regulations (32 C.F.R. § 1626.26 (a)) provides that the appeal board shall classify

the registrant “in the same manner in which a local board gives consideration thereto when it classifies a registrant.” Section 1626.26 (a) provides that the registrant shall not be placed in Class IV-F because of physical or mental disability unless the local board has so classified the registrant. This limitation does not extend to persons convicted of a felony and it does not prevent the appeal board from classifying a felon in Class IV-F, as required by the Act (50 U. S. C. A. App. § 456 (m)) and Section 1622.44 of the Regulations. Section 1626.26 (a) is restricted to physical and mental disability and does not extend to moral disqualifications or convictions of felonies. In the event such Regulation (32 C. F. R. § 1626.26 (a)) is construed so as to reach persons convicted of a felony then the appellant says that such Regulation is void because it is in conflict with the Act (50 U. S. C. A. App. § 456 (m)) for the reasons above stated.

United States v. Bouziden, 108 F. Supp. 395 (W. D. Okla. 1952), must be considered as dictum because the defendant in that case was acquitted on other grounds and no appeal could be taken from the ruling. The holding also is error, contrary to law and based upon the proposition that the congressional disqualification “is a discretionary power usable by the United States Government or the Selective Service System.” (108 F. Supp. at page 397) There is no such implication in the Act (50 U. S. C. A. App. § 456 (m)). Such interpretation is without any support whatever and is contrary to the express language of the Act.

While deferments are granted at the discretion of Congress, when the facts of a case show that the congressional mandate is applicable the Act of Congress cannot be rejected on the grounds that the action of the board is discretionary.—*Ver Mehren v. Sirmyer*, 36 F. 2d 876 (8th Cir. 1929) at pages 881-882; *Simmons v. United States*, 348 U. S. 397 at pages 405-406 (1955); *Sicurella v. United States*, 348 U. S. 385 at page 392 (1955); *Gonzales v. United States*, 348 U. S. 407, 416-417 (1955); *Shepherd v. United States*,

217 F. 2d 942, 946 (9th Cir. 1954) ; *Johnson v. United States*, 126 F. 2d 242, 247 (8th Cir. 1942).

The undisputed evidence in this case shows that the appellant had been convicted of a felony. This showing brought him squarely within the provisions of the Act (50 U. S. C. A. App. § 456 (m)) and Section 1622.44 of the Regulations, when reasonably construed consistent with the Act. The I-O classification is contrary to law and without basis in fact. It is arbitrary and capricious, making the final order to report for civilian work void. The district court should have sustained the motion for judgment of acquittal based on these contentions. The failure of the court below to do so, it is submitted, constitutes reversible error.

TWO

The appeal board arbitrarily and capriciously failed to follow the classification procedure commanded by Section 1623.2 by failing to come up from the bottom of the list of classifications from I-C up to IV-F but went down the list of classifications from I-A-O to I-O and ignored the IV-F classification, making the final order to do civilian work void.

Section 1623.2 of the Regulations (32 C. F. R. § 1623.2) places the I-A-O classification at the top of the list and it is stated to be "the highest class" and Class I-C is considered "the lowest class." IV-F is the fourth class from the bottom of the list. The Regulation (32 C. F. R. § 1623.2) says that "when grounds are established" the registrant shall be "classified in the lowest class for which he is determined to be eligible." The appeal board did not follow this classification procedure. It received the recommendation of the Department of Justice to place the registrant in Class I-O.

The reference of the case to the Department of Justice constituted a determination by the appeal board to ascertain if there was "new *support* for the registrant's claim." (*White v. United States*, 215 F. 2d 782 at page 790 (9th Cir.

1954). The recommendation of the Department of Justice was that the appellant be classified I-O. (F. 56-80) The appeal board sent this recommendation to appellant. (F. 55) After considering his answer, stating that he wanted to appeal the I-O, the appeal board classified him in that classification. (F. 4, 53-54) Theretofore on May 11, 1955, the appeal board forwarded the case to the Department of Justice for determination as to whether appellant was entitled to the conscientious objector classification. (F. 122)

The record references of the proceedings in the appeal board show that the appeal board at no time followed the classification procedure of going up from the bottom of the list, instead of coming down from the top of the list as commanded by Section 1623.2 of the Regulations (32 C. F. R. § 1623.2).

The violation of this procedural requirement constitutes a denial of procedural due process of law. *Ver Mehren v. Sirmyer*, 36 F. 2d 876 (8th Cir. 1929) at pages 881-882; *Simmons v. United States*, 348 U. S. 397, at pages 405-406 (1955); *Sicurella v. United States*, 348 U. S. 385 at page 392 (1955); *Gonzales v. United States*, 348 U. S. 407, 416-417 (1955); *Johnson v. United States*, 126 F. 2d 242, 247 (8th Cir. 1942). The burden is upon the Government to show that the violation of this procedural Regulation (32 C. F. R. § 1623.2) was harmless error. Since there is an absence of affirmative proof that the appellant was not prejudiced by the failure of the appeal board to follow the Regulation. It must be concluded that the appellant was harmed.—*Steele v. United States*, 240 F. 2d 142, at pages 145-146 (1st Cir. 1956); compare *Franks v. United States*, 216 F. 2d 266, 269-270 (9th Cir. 1954).

The record shows without dispute that the appeal board proceeded to consider appellant's case primarily on one question, which was whether or not he was a conscientious objector. It is true that the record does not disclose expressly that the appeal board admitted that it did not follow Section 1623.2 of the Regulations but the record also does

not show that the appeal board did follow the Regulation. Under *Steele v. United States*, 240 F. 2d 142, 145-146 (1st Cir. 1956), the failure of the Government to prove that the appeal board did follow the Regulation prevents any speculation by this Court that the appeal board did follow the Regulation. It is true that there is a presumption of regularity of administrative proceedings but this presumption does not apply in criminal proceedings because of the presumption of innocence. Notwithstanding *Koch v. United States*, 150 F. 2d 762, 763 (4th Cir. 1945), and *United States v. Fratricks*, 140 F. 2d 5, 7 (7th Cir. 1944), to the contrary, appellant says that the presumption of innocence in criminal proceedings makes inapplicable such presumption of regularity.

In *Jones on Evidence in Civil Cases*, Fourth Edition, Bancroft-Whitney Co., San Francisco, 1938, Volume 1, § 101, it is said: "Generally speaking, no legal presumption is so highly favored as that of innocence; ordinarily substantially all other presumptions yield to it in case of conflict." There the author cites *Dunlop v. United States*, 165 U.S. 486 (1897), and *Edwards v. United States*, 7 F. 2d 357. It is later stated in this section, fourth paragraph, that the presumption of innocence prevails over a large number of other presumptions. It is submitted, therefore, that it cannot be said that the appeal board is presumed to have followed the Regulation.

It is submitted therefore that this Court should hold that the appeal board failed to follow the procedural requirements of Section 1623.2 of the Regulations (32 C.F.R. § 1623.2) and by reason thereof the appellant was harmed to such an extent as to require reversal of the judgment of conviction in this case. The failure of the trial court to sustain the motion for judgment of acquittal for this reason constituted reversible error.

CONCLUSION

The judgment of the court below should be reversed because the trial court committed reversible error in denying the motion for judgment of acquittal because (a) there was no basis in fact for the denial of the IV-F classification and the final classification was contrary to law, making it arbitrary and capricious, and (b) the appeal board did not follow the procedural requirements of Section 1623.2 of the Regulations (32 C. F. R. § 1623.2) as to procedure to be followed upon classification; either or both of which make void the order of the local board supporting the conviction, requiring a reversal of the judgment of the court below.

WHEREFORE, the appellant prays that the judgment of the court below be reversed and the cause be remanded with directions to the trial court to enter a judgment of acquittal and discharge the appellant, or in the alternative order a new trial.

Respectfully submitted,

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APPENDIX A

INDEX OF EXHIBITS IN RECORD

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